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In the Supreme Court of the United States
October Term 1982

HOSPITALITY MOTOR INN, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Even assuming substantial evidence establishes that a company did not bargain in good faith with a union on other non-contested grounds, was the National Labor Relations Board nevertheless justified in basing a portion of its bad faith bargaining finding on the failure of the company to agree to a no-discrimination contract clause proposed by a union seeking an initial contract.

2. Further, concerning other contract proposals, was the National Labor Relations Board justified in basing a portion of its bad faith bargaining finding on the company's refusal to agree to union security or checkoff clauses.

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HOSPITALITY MOTOR INN, INC.
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NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Hospitality Motor Inn, Inc.,[1] the Petitioner herein, and the Respondent below, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on January 5, 1983.[2]

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[1]Pursuant to Rule 28. 1 of the Rules of this Court, Petitioner states that Hospitality Motor Inn, Inc. is doing business as Harley Hotels, Inc., a wholly owned corporation of Helmsley Enterprises, Inc., a Delaware corporation, the parent company.

[2]The company filed a timely Petition for Rehearing which was denied by order of the Sixth Circuit on May 14, 1983. A copy of such order is reproduced herein as Appendix C.

CITATIONS TO OPINIONS BELOW

The opinion below by the United States Court of Appeals for the Sixth Circuit is reported in 667 F. 2nd 562 and a copy of such opinion is reproduced in this Petition as Appendix A hereto. In addition the opinions of the National Labor Relations Board, the administrative agency in the case, are appended to this Petition as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was included in its opinion filed January 8, 1982 (Appendix A, infra). A timely Petition for Rehearing was denied by the said Court of Appeals on May 14, 1982 (Appendix C, infra), and this Petition for Certiorari was filed within 90 days of that date in accordance with the requirements of 28 U.S.C. 2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute involved is the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, et seq.). The relevant portions of said Act are reproduced in Appendix D hereto.

STATEMENT OF THE CASE

The National Labor Relations Board and the United States Court of Appeals for the Sixth Circuit have ruled that the company failed to bargain in good faith with the Hotel & Restaurant Employees and Bartenders Union, Local 235, herein called the union. After the union was certified by the Board as the collective bargaining representative for the company's bargaining unit employees at its Inn in Lansing, Michigan, the parties commenced bargaining for an initial contract in May, 1978. Although the parties met ten times and exchanged proposals and counterproposals, no agreement was reached and the last bargaining session was held January 19, 1979. The Board found that the company "had a fixed intent not to reach agreement respecting union security and dues checkoff and that the totality of its conduct—including, *inter alia*, its positions as to union security, checkoff, management rights, individual contracts and no-discrimination provisions also established that the company failed to bargain in good faith" (pages 14; 27, infra). The majority opinion of the Sixth Circuit ruled that the Board's finding that the company failed to bargain in good faith in violation of Sections 8(a)(1) and (5) of the Act was supported by substantial evidence (page 11, infra). For purposes of this Petition, the company is not contesting such overall bad faith bargaining finding.[3] However, the Court in its decision failed to directly address the issues the company is asking this Court to review—namely, whether substantial evidence supports the particular Board findings that the company's failure to grant a no-discrimination clause as well as the company's refusal to agree to a unilateral union security clause and a dues checkoff clause should be included as forming a part of the company's illegal refusal to bargain conduct.

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[3]The company before the Sixth Circuit did not contest another Board finding that it violated Section 8(a)(1) of the Act by promoting an employee to supervisor in an effort to curtail her union activities. Also, the company is not contesting in this Court the Board's bad faith finding respecting the individual contracts proposal and, for evidentiary reasons only, is not contesting the bad faith finding respecting the company's proposed managements rights clause.

REASONS FOR GRANTING THIS WRIT

A. The No-Discrimination Clause

The finding of the Board that the company was not bargaining in good faith by its refusal to grant a no-discrimination clause proposed by the union during collective bargaining for an initial contract is without precedent and, if allowed to stand, would force a party to subject itself to increased contractual liability without its willingness to do so voluntarily. By being forced to agree to include a no-discrimination clause a party would be risking additional liability, that of violation of contract, a libility it otherwise would not have. The cases *Electrical Workers, IUE* v. *NLRB (Westinghouse Electrical Corporation & General Motors Corporation.)* 648 F. 2nd 18, 24-25 (C.A., D.C., 1980) illustrate such additional contract liability. The Court there ruled antidiscrimination clauses in the collective bargaining contracts required the employers to supply a union with additional information which otherwise the employers might not have been legally obligated to supply.

It is realized that there are numerous laws and regulations seeking to eradicate discrimination in employment. Perhaps at the head of the list is Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e *et seq.*, as amended. This Court has emphasized that Title VII was enacted to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971).

Further, it is not disputed that bargaining over no-discrimination or antidiscrimination clauses are mandatory subjects for collective bargaining. *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 64 (1975). Neither is it disputed that national labor policy embodies the principles of nondiscrimination as a matter of highest priority. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

Nevertheless, there is no provision in the National Labor Relations Act that a party must be forced to add to its contractual obligations by including antidiscrimination contract

language unless voluntarily choosing to do so. It is submitted no finding of lack of good faith bargaining should be based on a party's refusal to agree to an antidiscrimination proposal. In fact, Section 8(d) of the Act in defining the obligation of the parties to bargain contains a proviso often quoted in refusal to bargain cases expressed in the following terms: ". . .such obligation does not compel either party to agree to a proposal or require the making of a concession. . ." In explanation this Court has stated in *Chicago & North Western Railway Company* v. *United Transportation Union*, 402 U.S. 570, 583, footnote 19 (1971):

> "Section 8(d) of the National Labor Relations Act, 29 U.S.C. Sec. 158(*d*), was added precisely because of congressional concern that the NLRB had intruded too deeply into the collective-bargaining process under the guise of enforcing the duty to bargain in good faith. See *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 30 LRRM 2147 (1952); *NLRB* v. *Insurance Agents' International*, 361 U.S. 477, 45 LRRM 2704 (1960)."

The holding in this case is contrary to the basic concept that good faith bargaining does not require the making of a concession as expressed in the proviso of Section 8(d) of the Act. Likewise, the majority opinion stands in conflict with the admonition expressed by this Court in *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 ". . .allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based. . ."

B. Union Security and Dues Checkoff

The Sixth Circuit's majority opinion in subject case respecting the company's refusal to agree to a union security clause and the company's failure to agree to a checkoff clause stands in conflict with those cases such as *Atlas Metal Parts Co.* v. *NLRB*, 660 F. 2d 304, 308-09 (C.A. 7, 1981) holding that it is no refusal to bargain for a party to refuse to recede from an announced position. Although the company in subject case opposed union security for "philosophical" reasons the company also furnished another reason for its refusal to grant the checkoff, namely that compulsory union membership would discourage prospective

student employees attending college at Michigan State University who might not want to be required to join the union to work at the Inn (page 20, infra).

Concerning the company's refusal to grant a checkoff in subject case the Board apparently based its bad faith finding on the fact that because the company withheld money from employees paychecks for the United Fund and for saving bonds programs the company was refusing to bargain in good faith by not agreeing to a full checkoff of union dues. This Board finding was made in spite of the fact that the company counterproposed a modified checkoff by offering the union a time and a place, such as a table inside the Inn, where the union could collect dues from those employees who wanted to pay union dues. The union did not accept this offer and, although it promised to do so the union failed to submit any counteroffers to the company's modified checkoff proposal (page 22, infra).

In any event it is submitted simply because a company is more desirous of accommodating a charitable or savings bond drive than in accommodating a union by collecting its union dues through an automatic checkoff provision should be no justification for ruling that such company conduct constitutes an unfair labor practice. In this connection in a ruling involving a constitutional issue, this Court in *City of Charlotte* v. *Local 660, International Association of Firefighters*, 426 U.S. 283, 285 (1976) ruled that a city could refuse to grant its employees dues checkoff privileges even though it withheld money from the paychecks of its employees for various other purposes.

CONCLUSION

The company strongly contends that the issues presented by this Petition represent important questions of federal labor law and that the Court should grant the company's Peition.

Respectfully submitted,

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APPENDIX A

OPINION AND JUDGMENT OF THE COURT BELOW

Decision of the United States Court of Appeals
For the Sixth Circuit in Cases Nos. 80-1583 and 81-1195

Decided January 5, 1982

BEFORE: WEICK and JONES, Circuit Judges, and SILER, District Judge*

The National Labor Relations Board (Board) petitions for enforcement of two orders which require the Hospitality Motor Inn, Inc. (Company) to cease and desist from unfair labor practices and to bargain in good faith with the Hotel, Motel, Restaurant Employees and Bartenders Union, Local 235 (Union).

The Company operates 14 motor inns throughout the country, including one in Lansing, Michigan. The Union began organizing the Lansing employees in 1977. A representation petition was filed and a Board election held on March 3, 1978. Ten days later, the Union was certified as the bargaining representative. Five or six days before the election, the Company promoted Dianna Hoffman, a proponent of the Union, from a position of day housekeeper to that of Assistant Executive Housekeeper. The parties held ten bargaining sessions between May 3, 1978 and January 19, 1979. No agreement was consummated. No further meetings were held.

The Board found that the Company's promotion of Dianna Hoffman, its refusal to accept Union proposals on dues checkoff and Union security, its insistence on a broad management rights clause which would have permitted unilateral acts by the Company and its refusal to accept "no discrimination" and "no individual contracts" clauses, viewed in the context of its repeated statements of opposition to the Union, showed a clear intent to

* The Honorable Eugene E. Siler, Jr., United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

frustrate the bargaining process. The Company objected to the various proposals for "philosophical" reasons. The Board rejected these reasons as not satisfying the statutory obligation to bargain in good faith. *Sweeney & Co. v. NLRB*, 437 F.2d 1127, 1134-1135 (5th Cir. 1971), *enforcing in part* 176 NLRB 208, 211, 212 (1969); *Kayser-Roth Hosiery Co. v. NLRB*, 430 F.2d 701, 703 (6th Cir. 1970).

The Company did not contest the Board's finding that Dianne Hoffman was promoted in an effort to curtail her Union activities. With respect to the finding of bad faith bargaining by the Company, the latter urges that the duty to bargain in good faith does not require the making of a concession. There was "give and take" on the dues checkoff and Union security proposals, insists the Company. With respect to its management rights clause, the Company asserts that it was reasonable and contained conditional language which should have rendered it unobjectionable to the Union. Finally, the Company protests the conclusion that its disinclination to include "no discrimination" and "no individual contracts" clauses was proof of bad faith bargaining. Since it is already bound by anti-discrimination laws, the Company argues, it would be useless to include these clauses. Furthermore, the Company suggests that such an inclusion might mislead employees into thinking the Company is predisposed to discriminate.

In judging whether good faith bargaining has been engaged in, "the board has been afforded flexibility to determine ... whether a party's conduct at the bargaining table evidences a real desire to come into agreement." *NLRB v. Insurance Agents*, 361 U.S. 477, 498 (1960). Also, the Board's finding is one of "mixed fact and law, [and] a court will not lightly disregard the overall appraisal of the situation by the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge ...." *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953).

Based upon the entire record, the briefs and oral arguments of counsel, we conclude that the finding of the Board that the Company failed to bargain in good faith in violation of section 8 (a) (5) and section 8(a) (1) of the Act is supported by substantial evidence.

Accordingly, the orders of the National Labor Relations Board are ordered ENFORCED.

Judge Weick would deny the order to enforce.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN

Clerk

(DISSENTING OPINION)

National Labor Relations Board v. Hospitality Motor Inn, Inc.
Nos. 80-1583, 81-1195

WEICK, Circuit Judge, dissenting: I respectfully dissent. In my opinion, an employer is not required to agree to any of the proposals made by a labor union in bargaining sessions nor is the union required to agree to proposals made by the employer. It does not constitute an unfair labor practice for either the company or the labor union to disagree. The findings of the Board that the employer did not bargain in good faith are not supported by substantial evidence and the order based thereon should not be enforced.

APPENDIX B

OPINIONS AND JUDGMENTS OF THE ADMINISTRATIVE AGENCY INVOLVED

Decision and Order
Of the National Labor Relations Board
In Board Case Nos. 7-CA-15392 and 7-CA-15574
(Sixth Circuit Case No. 80-1583)

On November 23, 1979, Administrative Law Judge Ralph Winkler issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hospitality

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1 We agree with the Administrative Law Judge's finding that Respondent had a fixed intent not to reach agreement on union security and dues checkoff and that the totality of its conduct also established that Respondent failed to bargain in good faith in violation of Sec. 8(a)(5) and (1) of the Act. In so finding, we do not rely on the Administrative Law Judge's comment that "[n]o self-respecting labor organization could, as Respondent would have the Union do in this case, enter into a contract without the benefit of union-security or checkoff provisions and without a measure of employee security afforded by an arbitration or even a 'just cause' provision."

In his Decision, the Administrative Law Judge stated that Respondent's promotion of employee Hoffman violated Sec. 8(a)(1) of the Act. We note that the General Counsel's complaint does not allege Hoffman's promotion to be a violation of Sec. 8(a)(3), but rather only that it violated Sec. 8(a)(1) of the Act. We, therefore, affirm the Administrative Law Judge's finding with regard to Hoffman's promotion only to the extent that he found it to be a violation of Sec. 8(a)(1) of the Act.

Motor Inn, Inc., Lansing, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. June 4, 1980

Howard Jenkins, Jr.,	Member
John A. Penello,	Member
John C. Truesdale,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Decision Of The
Administrative Law Judge
In Board Case Nos. 7-CA-15392 and 7-CA-15774
(Sixth Circuit Case No. 80-1563)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Statement of the Case

RALPH WINKLER, Administrative Law Judge: Pursuant to charges filed by Hotel and Restaurant Employees & Bartenders Union, Local No. 236 ("Union"), a hearing was held upon an amended complaint issued by the General Counsel and an answer filed by Respondent.

Upon the entire record, including observation of witnesses and consideration of briefs, I make the following:

Findings of Fact

I. *Business of the Respondent*

Hospitality Motor Inn, Inc., is an Ohio corporation engaged in the business of innkeeping; it has 14 motor inns throughout the country, including one in Lansing, Michigan. Respondent is an employer within Section 2(6) and (7) of the Act.

II. *The Labor Organization Involved*

The Union is a labor organization within Section 2(5) of the Act.

III. *Unfair Labor Practices*

The Union began organizing the employees of Respondent's Lansing facility in the latter part of 1977. The Union thereafter filed a representation petition and won an election held on March 3, 1978; it was consequently certified on March 13, 1978, as the bargaining representative for a unit of all full-time and regular part-time employees at the Lansing inn, including lodging, food, and beverage employees.

The General Counsel alleges that for union considerations Respondent promoted Dianna Hoffman on February 28, 1978, threatened employees with discharge in June 1978, and discharged Nathaniel Upchurch in July 1978. The complaint further alleges that Respondent unilaterally changed its method of computing vacation pay of employees and that it failed to bargain in good faith during contract negotiations with the Union.

Dianna Hoffman's promotion

Mrs. Hoffman had been a day housekeeper with Respondent since 1977; her duties were to clean guest rooms. She was promoted to the job of Assistant Executive Housekeeper 5 or 6 days before the March 1978 election.

At material times here, Paul Ryan was the Inn Manager, Mrs. Cecilia Kreis was Executive Housekeeper, and Mrs. Audrey Baldwin was an Assistant Executive Housekeeper. Baldwin credibly testified without contradiction that she was present at a conversation between Kreis and Ryan in the latter's office in February 1978. This was during the pre-election period. Ryan and Kreis discussed Hoffman at the time, according to Baldwin, and they "agreed" that Hoffman was a "troublemaker" because she was "pushing the Union." Ryan told Kreis "it would be better to get her [Hoffman] off the floor." Kreis later explained to Baldwin that she wanted Hoffman off the floor because Hoffman "was talking to the girls about the Union." Hoffman was promoted to Assistant Executive Housekeeper a few days before the election and Baldwin testified that this was the first time, at least since 1974, that Respondent had more than one such assistant. Ryan testified in this proceeding, but not respecting Hoffman's promotion; Kreis did not testify at all.

The record supports the General Counsel's contention that Respondent promoted Hoffman in order to curtail her union ac-

tivities. Respondent thereby violated Section 8(a) (1) and (3) of the Act. *Thermo Electric Co., Inc.*, 222 NLRB 358, 366 (1976) (as to Santana).

Unilateral change in vacation payments

The General Counsel alleges, in effect, that Respondent unilaterally reduced the employees' hourly rate of vacation payments from approximately $2.35 to $2.00. "Unilateral action" situations involve changes in terms or conditions of employment during the incumbency of a statutory representative where the employer institutes a change without bargaining on the matter with the bargaining representative. *N.L.R.B. v. Katz*, 369 U.S. 736 (1962); *Jimmy Dean Meat Company*, 227 NLRB 1527, 1530 (1977). Respondent denies that it reduced hourly vacation payments.

It is recalled that the election was held on March 3, 1978, and that the Union was certified as bargaining representative on March 13, 1978. The General Counsel introduced the check stubs of employee Mrs. Edith Cummings for vacation periods ending February 19, 1978 and July 16, 1978. The checks for these period were respectively dated February 27, 1978, and July 24, 1978. The check stubs show that Cummings' vacation pay for both periods was calculated at $2.00 an hour. If there was a reduction in vacation rates, the change was instituted and implemented at least by February, 27, 1978, which was before Respondent had any bargaining obligation to the Union. I find, therefore, that Respondent did not engage in unlawful "unilateral" action.

Threats

Ryan held what Hoffman described as a "supervisory staff meeting" late in June 1978. This was during the period of contract negotiations between Respondent and the Union, and Hoffman had been an Assistant Executive Housekeeper for several months. The topic discussed at the meeting was how to keep the motel running in the event of a strike. At the meeting's end, according to Hoffman, Ryan requested her and "three other supervisors" to remain. Ryan then told them that as supervisors they would be expected to help operate the motel should there be a strike; he also told them that supervisors were not to engage in union activities and that they "could no longer be supervisors" and should forget about their jobs if they did so participate.

Claiming that Hoffman and the other three individuals were supervisors under the Act, the Respondent asserts that Ryan's mentioned remarks to them were not unlawful because, as it rightly contends, the Act's protections do not generally apply to such personnel. The General Counsel alleged, in effect, that all four were employees rather than supervisors. The thrust of the "threats" allegation was focused on Hoffman, at least as litigated by the General Counsel, although Respondent did make a showing concerning the supervisory status of others as well. I consider it appropriate in the circumstances to address only Hoffman's status. While agreeing that the Executive Housekeeper occupies a supervisory position under the Act, the General Counsel contends that Hoffman, as an Assistant Executive Housekeeper, did not.

The motel has 156 guest rooms in six wings, and there are approximately 30 employees under the Executive Housekeeper, including laundry personnel. Hoffman testified that an Assistant Executive Housekeeper assists the Executive Housekeeper and takes over the latter's responsibilities during her vacation periods and other absences; checks the work performance of the housekeepers; is authorized to send housekeepers home for the day if they don't perform properly; is authorized to assign overtime work and to call in extra help; recommends hiring of employees and sits in with the Executive Housekeeper during job interview; and, while not authorized to fire employees, is responsible for making reports on the quality and quantity of their work that could lead to discharge or other disciplinary action.

An Assistant Executive Housekeeper is clearly a supervisor within Section 2(11) of the Act. *Dunkirk Motor Inn, Inc., d/b/a Holiday Inn of Dunkirk-Fredonia*, 211 NLRB 461, 462 (1974). I accordingly find that Ryan did not unlawfully threaten Hoffman for activities protected under the Act. *L & S Enterprises, Inc.*, 245 NLRB No. 144, 102 LRRM 1418 (1979).

Bad-faith bargaining

The amended complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act by bargaining without any intent to reach agreement with the Union, by having a "fixed intent" not to reach agreement respecting union security and dues

check-off, by failing to meet at reasonable times for negotiating sessions, and by presenting "as its total bargaining offer proposals which eliminated or reduced most existing employee benefits, and which gave management virtually unlimited freedom in most areas of collective bargaining and which were designed to prevent the parties from reaching agreement as well as reneged on proposals previously agreed upon."

Although, the parties had 10 bargaining sessions in Lansing, Michigan, the first on May 3, 1978, and the last one on January 19, 1979.

May 3, 1978: The Union was represented by Union Organizer Nadia Watson and eight other individuals, including employee Nathaniel Upchurch. Respondent's main spokesman was Edward Jenss, the Manager of Personnel Services, Cleveland, Ohio; he was accompanied by three other Company representatives. The Union presented contract proposals, but not its economic demands, and the parties had a general discussion lasting four or five hours. Jenss told the Union that Respondent representatives had no previous bargaining experience—this was the first of Respondent's motels to be organized—and that the Union would have to be patient with them. The Union desired to schedule a second meeting shortly after this first session but Respondent's negotiators had problems in this regard because each of them represented different aspects of Respondent's overall operations and came from different locations (outside of Lansing) and they had prior commitments. The Union protested that negotiations could proceed without all four of Respondent's negotiating team, but Respondent said it was necessary that all four attend. The parties finally scheduled meetings for June 6 and 7..

June 6, 1978: The parties again went over the Union's proposals. While various matters were discussed, the most heated discussion concerned union-shop and check-off proposals which Respondent rejected. Respondent made clear at this and at later sessions that it didn't want a union at the Inn and that it was philsophically opposed to a union-shop requirement because of a belief in "voluntary membership" and also because

it would purportedly discourage local college students 1/ from seeking employment with Respondent. Respondent initially stated that its computer accounting system could not handle a dues check-off. 2/ Later in this session and at subsequent meetings, Respondent made clear that it opposed a union dues check-off because to grant such check-off would be a tantamount to endorsing the Union and that Respondent could not philsophically give such endorsement to the Union. According to Respondent, the collection of dues is the Union's business, not Respondent's.

Other issues discussed at this bargaining session were: the probationary period, the grievance procedure, the number of hours that constituted full-time employment, vacations, the number of stewards, and a clause forbidding individual employee contracts with the Company. The Union proposed a 31-day probationary period. The Respondent counter-offered a probationary period of 90 working or 120 calendar days. The Union proposed a grievance-arbitration procedure with a no-strike clause. The Respondent rejected it. The Union proposed that employees be considered full-time if they worked 20 hours per week, it appearing that most of the unit employees work 20 to 26 hours per week. The Respondent counter-offered 30 hours per week. With respect to vacations, the Union proposed the existing benefits as described in Respondent's Employee Handbook, namely two weeks vacation after one year or 1,000 hours of work. Respondent countered with one week after one year or 1,500 hours. The Union proposed one chief steward and three stewards (one for each department—housekeeping, kitchen, dining room, and banquet). Respondent insisted on a single steward for the entire bargaining unit of approximately 120 employees. Finally, Respondent would not agree to clauses which prohibited individual contracts with employees and which prohibited discrimination for union, racial, sex, age and

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1 Michigan State University is located in Lansing. At either this or another meeting Respondent stated that the Company employed many students at their various locations and that it was "difficult to get students" who had to join a union and pay initiation fees. Respondent offered no supporting evidence for such statements at the present hearing.

2 Respondent does make payroll deductions for U.S. Savings Bonds and United Fund.

creed reasons; it purportedly objected to such clauses because the "law" already prohibited individual contracts and discriminatory conduct and that it therefore was not necessary to include such clauses. That evening the Union presented the Respondent with its economic proposals.

June 7: Encompassing many issues of the previous day, this bargaining session was rather short because neither party budged from its initial position. The meeting ended with an attempt to schedule the next session. The Respondent said that it had to cancel a previously agreed-upon meeting for June 19th. The Union requested that Respondent commit itself to a date prior to June 30th. Respondent replied that it could not meet until July. The parties eventually agreed to meet on July 7.

July 7: Respondent offered its first proposed contract. I will only mention those company proposals that the Union considered unacceptable. The Union questioned why there were no provisions for union security or dues check-off in the proposals. The Respondent reiterated its position that the Company could not endorse the Union. The Union objected to a proposed three-step grievance procedure which contained neither a no-strike clause nor a provision for arbitration. A 180-day probationary period was proposed which the Union argued was twice the current period stated in the Employee Handbook. The Respondent explained that the 90-day probationary period in the Employee Handbook was for pay purposes only and that since 1970 there had been a 180-day probationary period. The Company proposals also contained a management rights clause which is set forth in Appendix A herein and to which the Union objected. The proposals also failed to provide for a free lunch and complimentary weekend currently contained in the Employee Handbook. When the Union inquired why they were not in the proposals Respondent said it was an oversight. Respondent felt that since it had already been providing such benefits there was no need to include them in the contract. Finally, the Company offered the same vacation plan it had counter-offered at the June 6 session. The Union said it could not agree to that proposal. At this point the Union's position was that the Company proposals did not reflect benefits that the employees were already receiving.

July 26: The Respondent proposed its second contract. The only significant difference between this contract and the initial Company proposals was that the new offer omitted a provision that was in the first contract's seniority clause which stated that other things being equal, seniority would prevail in cases of layoff and rehiring. 3/ The 20 hours versus 30 hours requirement for regular employment was also discussed at this meeting. After the Respondent would not agree to a "discharge for just cause" clause, the Union suggested that the parties call in a mediator to help resolve their differences. Respondent agreed. A federal mediator could not meet with the parties until September 14, so the bargaining was suspended until that date.

September 14: Two mediators (one state, one federal) attended this session. Mr. George Gardner, labor counsel for Respondent, was also present. The state mediator suggested that the parties try to resolve ten issues at that meeting. Six issues were discussed; non was resolved. Union security and dues check-off were briefly considered. Respondent reiterated its position with respect to union security; but counter-offered on the dues check-off issue. It proposed to give the Union time and a place —such as a table inside the Inn—where the Union could collect dues from those employees who wanted to pay. The Union did not accept this offer. There was some discussion about the Respondent's refusal to accept the Union's proposed no-discrimination clause. As indicated above, Respondent had earlier rejected such clause as unnecessary because the "law" already prohibited discrimination. Respondent asserted that it had been abiding by the law, had every intention of continuing to do so, and felt that the inclusion of such clauses in the contract would indicate to employees that the Company had a tendency to thwart the law.

Another item raised at this meeting was management rights. Except for a change in the subcontracting language, Respondent continued to insist on its management rights proposal. 4/ Respondent also offered to lower the probationary period to

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3 Respondent included this provision in later proposals.

4 The change involves the deletion of the language bracketed in Appendix A. This change does not appear to alter the original version which gives management an unrestricted right to subcontract any work.

120 days and said that it would come up with a counter-proposal on operation procedures. The Union then suggested that the parties discuss economics, but Respondent refused and the session ended. The Union offered several dates for the next session, but Respondent insisted that it could only meet on October 5.

October 5: Respondent presented a third proposed contract. From a comparison of this and Respondent's fourth proposed contract, it is evident that the parties, at this meeting, reached agreement on some aspects of the seniority clause and the holiday pay clause. It also appears that Respondent altered its previous position with respect to stewards, agreeing to one chief steward, one day steward, and one night steward. Union security and dues check-off remained the areas of greatest contention. The Union asked whether union security and check-off were possible if the parties could reach agreement on other matters. Respondent replied that it would never concede on union shop or check-off, even if 100 percent of the employees signed authorization cards.

October 24: A federal mediator attended. Respondent presented its fourth contract which was essentially the same as the third, the difference being that it contained the points upon which the parties had agreed at the previous session. Respondent had lowered its probationary period to 120 days, but the Union still insisted on 90 days. The Company refused to proceed on sick leave and neither side would alter its position on wages. The union security and check-off issues arose again and Respondent refused to alter its position. The parties did not set a future date for bargaining.

On November 8, the Union sent a letter to Respondent requesting that the negotiations continue. Respondent suggested meeting on December 1, but had to cancel. On December 6, the Company sent a letter to the Union proposing December 19 as a date for the next session. The Union agreed.

December 19: The Company presented its medical plan and wage proposal. The Union presented a counter wage proposal. There was some discussion concerning the pending acquisition of Respondent by Helmsley Enterprises. The Union inquir

whether this would have any effect upon Respondent's stand on union security check-off. Respondent said it would not. The Union then requested that the parties meet the next day, but Respondent said that it could not meet until January 19, 1979.

January 19: At this meeting the parties discussed Respondent's proposed health insurance plan. The Union considered it to be inadequate because it would cover only 10 of the unit employees. The Union proposed a weekly disability benefit plan, but the Company responded that its current sick leave program was adequate. The Union requested that Respondent furnish it with a revised list of employees including classifications, rates of pay, and eligibility for the insurance program. It received the list on February 2, 1979.

The Union security and dues check-off issues arose again, but neither party had changed its position. The Union said it would mail Respondent a modified union-security proposal. As of March 6, 1979, Respondent had not received this new proposal. This, however, is not critical because the record establishes the unlikelihood that any proposal would have prompted Respondent to alter its position on this issue. Respondent, moveover, had not offered any modified proposal of its own on this item.

There were no other bargaining sessions prior to the date of this hearing. The following Company proposals are still on the table: an improved insurance program, a health and welfare program, and a proposed wage increase as of January 1, 1979, that Respondent has not implemented due to the Union's failure to respond. With respect to union security and dues check-off, the Union's position was that it would not agree to a contract without either provision.

Discussion — 8(a)(5)

Recently, in *United Contractors Incorporated*, 244 NLRB No. 13, 102 LRRM 1012, 1014 (1979), the Board had occasion to restate principles that are equally applicable here:

"Section 8 (a)(3) of the Act establishes a duty 'to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement.' *N.L.R.B. v. Herman Sausage Company, Inc.*, 275 F.2d 229, 231 (5th Cir. 1960). As the Supreme

Court stated in *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO (Prudential Insurance Company of America)*, 361 U.S. 477, 485 (1960):

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.

This obligation does not compel either party to agree to a proposal or to make a concession. *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395 (1952). However, the Board may, and does, examine the contents of the proposals put forth, for, "If the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the position taken by an employer in the course of bargaining negotiations." *N.L.R.B.* v. *Reed & Prince Manufacturing Company*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887." The Board has also observed in this connection that "Rigid adherence to proposals which are predictably unacceptable to the Union may indicate a predetermination not to reach agreement, or a desire to produce a stalemate, in order to frustrate bargaining and undermine the statutory representative." *Tomco Communications, Inc.*, 220 NLRB 636 (1975). The determination of good or bad faith bargaining, needless to add, must be made on the "totality" of the employer's conduct. *N.L.R.B.* v. *Reed & Prince Manufacturing Company, supra*, 205 F.2nd at 134.

No self-respecting labor organization could, as Respondent would have the Union do in this case, enter into a contract without benefit of union-security or check-off provisions and without a measure of employee security afforded by an arbitration or even a "just cause" provision. This is particularly so where the employer also demands as a condition of a contract that the Union and the unit employees abandon "their right to be consulted regarding practically any and all disputes that might arise during the term of the contract relating to terms and conditions of employment, i.e., to waive their statutory rights

to bargain collectively." *Tomco Communications Inc.*, *supra*, 220 NLRB 636. That, in my opinion, is a reasonable evaluation of the management rights clause demanded by Respondent in this case. As appears in Appendix A, the Respondent would, in effect, retain for itself the *sole right* to transfer, suspend, and discharge employees for *any* reason; to make and enforce rules; to determine the prices of products and services sold and furnished to employees; to determine volume and rate of production; to redetermine the number and location of its operations and to discontinue operations; to subcontract work; and, to establish new job classifications and rates of pay. In addition to reserving these and other enumerated rights, the management rights proposal further states that the Company "retains all rights not otherwise specifically covered by this Agreement." Cf., *Gulf States Canners Inc.*, 224 NLRB 1566, 1573-1576 (1976); *Betra Manufacturing Company*, 233 NLRB 1126, 1135-1136 (1977).

While the Act does not require that an employer grant a union's bargaining proposals for union-security and check-off provisions, the assertion of "philosophical" objections does not satisfy the statutory obligation to bargain in good faith concerning these matters. *Sweeney & Company, Inc.* v. *N.L.R.B.*, 437 F.2d 1127, 1134-1135 (C.A. 5, 1971), enf'g 176 NLRB 208, 211-212 (1969). United Fund and U.S. Savings Bonds have inestimable social value, and Respondent is performing a public service in checking off these items for its employees. A check-off of union dues also serves the public good, however, for by this Act Congress has proclaimed the national purpose served by collective bargaining where the affected employees have selected a statutory representative. In any event, as an employer may not disparately ban solicitation for union purposes while allowing solicitation for other causes 5/ it similarly may not disparately refuse to check off union dues while voluntarily providing such accommodation for non-union purposes. 6/ National policy does prohibit discrimination for reasons of race, color, creed, sex, etc., and unions as well as employers have obligations to unit employees in these respects. It is fair to say as

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5 *Lamco, Inc.*, 241 NLRB No. 97, 100 LRRM 1860, 1861 (1979).

6 *Farmer's Co-operative Gin Association*, 161 NLRB 867, 902-903 (1966), enf'd 389 F.2d 883 (C.A. D.C., 1968).

a matter of administrative knowledge, that no-discrimination clauses are commonly, if not generally, included in collective-bargaining agreements, and there is, I find, no reasonable basis for refusing to include such provision in a labor contract, or for refusing to include a provision banning individual contracts with unit employees. In any event, one is impelled to question the good faith of a bargaining position that such provisions are unnecessary because the "law" already prohibits such conduct.

The record establishes, I find, that Respondent had a fixed intent not to reach agreement respecting union security and dues check-off. The totality of its conduct—including, *inter alia*, its positions as to union security, check-off, management rights, individual contracts, and no-discrimination provisions—also establishes that Respondent engaged in bargaining without a good faith intent and effort to "resolve differences and reach a common ground" with the Union. *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO, supra*, 361 U.S. at 486; *N.L.R.B.* v. *Reed & Prince Manufacturing Company, supra*, 205 F.2d at 134-135; *N.L.R.B.* v. *Herman Sausage Co., supra*, 275 F.2d at 232; *Tomco Communications, Inc., supra*, 220 NLRB 636. Without more, I thus conclude that Respondent has violated Section 8(a)(5) and (1) of the Act. 7/

The Upchurch discharge

Nathaniel Upchurch was hired and began working in Respondent's laundry room in July 1977. Respondent discharged him on Wednesday, July 19, 1978, purportedly for "leaving his place of duty" and for overloading a washing machine.

Upchurch joined the Union during the organizational campaign—it is recalled that those activities began in the latter part of 1977—and he solicited and obtained signed union authorization cards from about 60 of the approximately 120 employees in

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7 Respondent, an operator of 14 inns, was engaging in collective bargaining for the first time. Because it felt that this first contract could set a pattern for its other inns, it insisted on a negotiating team that was representative of its various operating functions and locations. This creates some delays in scheduling of meetings, but such delays are understandable in the circumstances, and I do not find that Respondent was deliberately engaging in dilatory tactics.

the bargaining unit. Ryan, the Manager, testified that he was unaware of Upchurch's organizational activities, and there was no direct evidence that Upchurch solicited employees in Ryan's or any other management representative's presence. Upchurch, however, did talk to Ryan on several occasions in December 1977 about a shortage of laundry personnel and the poor condition of laundry equipment. The record also shows that after the Union filed its representation petition but before an election was directed, Upchurch sought and obtained Ryan's permission to post an NLRB notice at the employee time clock and in the laundry. This notice stated that a representation petition had been filed; it also described the rights of employees under the Act and gave examples of conduct by which employers and unions would interfere with those rights and which would warrant setting aside an NLRB election. About two months before his discharge in July, Upchurch complained to management that employee paychecks were several days overdue. He was told to call Respondent's corporate headquarters in Cleveland; he did so and spoke on that occasion with Jenns, the Personnel Services Manager, and the checks arrived at the Lansing airport a half hour later. Upchurch was a member of the Union's negotiating team, albeit not a principal spokesman, and he attended bargaining sessions held before his discharge.

On March 4, 1978, the day after the election, Ryan summoned Upchurch to his office and requested Upchurch to sign a disciplinary notice. The notice accused Upchurch of going out to his car in the Inn parking lot during a coffee break, asking one of the female employees for a "date," and being "too bossy." Upchurch admitted the first item to Ryan and denied the other two, and he testified that he signed the form because Ryan directed him to do so. This was the first time Upchurch had been reprimanded, and Ryan warned him on this occasion that the next time "some other actions would be taken."

Respecting the matter of Upchurch going out to the parking lot, the record establishes that Respondent has a rule requiring employees to remain in the employees' dining room and not to go outside the building during coffee break. Upchurch admittedly knew of the rule. Hoffman testified that other employees had also violated this rule and that nothing was said to them; she testified in explanation that their immediate supervisors

hadn't observed these derelictions and that the employees would have been reprimanded had the supervisors "caught" them.

Respondent purchased two new washers for the laundry about a month before Upchurch was discharged. The equipment cost some $30,000. The laundry personnel, including Upchurch, were given operating instructions and were cautioned against overloading the washers. A repairman for the washer sales company came to the premises on July 19 to check a problem Respondent was having with one of the washers. This was the second service call since the new washers were installed. The other washer was in use at the time, and the repairman observed that it was overloaded. The repairman reported to Ryan that overloading was part of Respondent's washer problem and was causing an imbalance in the equipment's mechanism. Ryan and Hoffman shut down the machine being used and counted the laundry in it. They found that the washer was "terrifically overloaded," according to Hoffman's description but that the machine was not damaged. Ryan then sought to find out who had overloaded the machine and two other laundry employees present at the time denied having done so. Upchurch was not in the laundry area or in the "break room" and Ryan inquired about his whereabouts. Upchurch, Ryan shortly learned, had loaded the washer that day and, once again in breach of Respondent's rule, had gone to the parking lot during a break period to check a faulty tire on his car.

When Upchurch appeared some minutes later, Ryan instructed him to go to his (Ryan's) office. There, in the presence of Executive and Assistant Executive Housekeepers Kreis and Hoffman, Ryan referred to Upchurch's prior warning about leaving the building and Ryan also mentioned the overloaded washer to Upchurch. Ryan then asked what Upchurch thought Ryan should do. Upchurch replied that Ryan was the "boss" and should do what he thought best. Ryan thereupon told Upchurch he would be suspended until Monday. Before the group left Ryan's office on this occasion, Ryan was summoned to placate an irate guest who was complaining about having received soiled linen in his room the previous day. (Hoffman testified that an overloaded washer makes "the wash come out as dirty as when it went in.") Ryan returned to his office after

speaking with the guest and he asked Upchurch to wait outside. Ryan then discussed Upchurch with Kreis and Hoffman and he asked for Kreis' recommendations. Hoffman credibly testified that Kreis then complained about "$30,000 worth of equipment that was being ruined" and that she could not have Upchurch in the laundry any longer. Kreis recommended that Upchurch be fired and Ryan then discharged him.

Hoffman testified that she had warned Upchurch and other laundry personnel several times about overloading and that no others had been disciplined. Hoffman's general comment as to Upchurch was that he "was a good worker when he wanted to be and he was a bad worker when he wanted to be."

Contending that Respondent was aware of Upchurch's organizational role in the Union's behalf and that Respondent's bargaining conduct indicated an "unrelenting animus" toward the Union, the General Counsel urges that Respondent's purported reasons for the discharge were "pretextual." The General Counsel further asserts that in disciplining Upchurch Respondent treated him disparately from other employees as to overloading washers and in regard to violating the rule against leaving the building.

The record does show, as the General Counsel contends, that the Union occupies a "low rank in Respondent's scheme of things" and that Respondent knew that Upchurch was involved in Union affairs. Unlike Upchurch, however, the record does not show that other employees were "caught" violating the rule by their immediate supervisors. In any event, the circumstances on July 19 combined a repetition of the mentioned rule violation and a "terrific" overloading of washer, at the same time that a serviceman attributed the malfunction of a washer to such overloading and while Ryan was called to appease a guest who was complaining about dirty linen. July 19 was not Upchurch's lucky day. Considering the events of that day, and mindful that there may be elements of suspicion involved, I cannot find that the record preponderantly establishes that either Kreis or Ryan was motivated by union considerations in Kreis recommending or in Ryan effecting Upchurch's discharge.

Conclusions of Law

1. Respondent is an employer within Section 2(6) and (7) of the Act.

2. The Union is a labor organization within Section 2 (5) of the Act.

3. Respondent has violated Section 8 (a)(1) of the Act by promoting employee Dianna Hoffman.

4. Respondent has failed to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act.

5. Respondent has not engaged in other violations alleged in the complaint as to unilateral changes in vacation payments, threats of discharge, and the discharge of Nathanial Upchurch.

The Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom and that it take affirmative action in order to effectuate the policies of the Act.

Upon the findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c), I issue the following recommended: 8/

ORDER

Respondent, Hospitality Motor Inn, Inc., Lansing, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promoting or reassigning employees for union activities.

(b) Refusing to bargain in good faith with Hotel & Restaurant Employees & Bartenders Union, Local No. 235.

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8 In the event no exceptions are filed as provided by Section 101.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 101.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights under the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Bargain in good faith with Hotel & Restaurant Employees & Bartenders Union, Local No. 235, for the certified bargaining unit at its Lansing Inn.

(b) Post at its Lansing, Michigan, facility copies of the attached notice marked "Appendix B." 9/ Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Decision, what steps Respondent has taken to comply herewith.

3. The certification year of Hotel and Restaurant Employees Bartenders Union, Local No. 235, is hereby extended and shall began running from the date upon which Respondent begins to bargain in good faith.

Dated, Washington, D. C. November 23, 1979

Ralph Winkler
Administrative Law Judge

9 In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

MANAGEMENT RIGHTS

It is expressly agreed and understood that, except as otherwise provided by the Agreement and by law, the Company retains the sole right to manage the affairs of the business and to direct the working forces thereof and shall have the right to hire, assign, transfer, suspend or discharge for proper cause and to relieve employees from duty because of lack of work or other reasons, and to make and enforce reasonable rules and regulations which do not conflict with the terms and provisions of said Agreement. The determination as to when "lack of work" exists is to be made solely by the Company. The Company will furnish the Union with copies of all new, changed and/or rescinded rules and regulations. Except as otherwise provided herein, the Company further reserves the sole and exclusive right to determine the prices of products and services, including those sold and furnished to employees, volume and rate of production, production standards, to establish or continue policies, practices and procedures for the conduct of business, and from time to time, redetermine the number, location, relocation and types of its operations within the confines of the appropriate bargaining unit, and the methods, tools, equipment, processes and materials to be employed, and to discontinue processes or operations. The Company retains and may exercise the free and unrestricted right and privilege to contract or subcontract with any person or persons not covered by this Agreement, and with any firm or corporation for the performance of any work, services, jobs or operations or any character or nature [regardless of whether or not such work, services, jobs or operations is normally performed by employees covered by this Agreement.] The Company reserves the right to establish new job classifications, and rates of pay and will notify the Union of such changes. Management employees, supervisors and assistant supervisors may do work assigned to them by the Company. Nothing in this Agreement shall limit the Company's right to train any employee on any job at any time for the purpose of qualifying such employee for supervisory or managerial responsibility, and the Company shall have the sole right to select employees for this training. The Company retains all rights not otherwise specifically covered by this Agreement.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT promote or reassign employees for union reasons.

WE WILL, upon request, bargain in good faith with HOTEL & RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL NO. 235.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

HOSPITALITY MOTOR INN, INC.

(Employer)

Dated_____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue - Room 300, Detroit, Michigan 48226, Telephone (313) 226-3244.

Decision and Order
Of the National Labor Relations Board
In Board Case No. 7-CA-16351
(Case No. 81-1195 in the Sixth Circuit)

Petitioner's Note 1. Although this case was consolidated with Case No. 80-1583 by the Sixth Circuit, subject Petition for Certiorari does not address any issues contained in this latter administrative proceeding.

On April 18, 1980, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed limited cross-exceptions and a brief in support thereof, and Respondent filed an answering brief to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hospitality

1 Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Motor Inn, Inc., Lansing, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. July 28, 1980

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) John C. Truesdale, Member

NATIONAL LABOR
RELATIONS BOARD

DECISION OF THE ADMINISTRATIVE LAW JUDGE

Statement of the Case

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on February 5, 1980, at Lansing, Michigan.

The charge was filed on May 7, 1979. The complaint in this matter was issued on June 4, 1979. The issues concern whether the Respondent has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act by sending a letter declining a request for continuation of bargaining and by thereafter failing and refusing to meet and bargain with the Union.

Petitioner's Note 2. Please see Petitioner's Note 1, preceding page, supra.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and the Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:1/

Findings of Fact

1. The Business of the Employer 2/

Hospitality Motor Inn, Inc., the Respondent, is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Ohio.

At all times material herein, Respondent has maintained its principal office and place of business at 2100 Terminal Tower in the City of Cleveland, and State of Ohio, herein called the Ohio place of business. Respondent maintains other facilities in the State of Michigan. Respondent is, and has been at all times material herein, engaged as an innkeeper in the providing of lodging for transit guests and the furnishing of foods and beverages to the general public. Respondent's facility located at 3600 Dunckel Road, Lansing, Michigan, is the only facility involved in this proceeding.

During the year ending Deember 31, 1978, which period is representative of its operations during all times material hereto, Respondent in the course and conduct ot its business operations, had a gross volume of business in excess of $500,000 and purchased and caused to be transported and delivered at its Lan-

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1 At the trial, statements of counsel and certain letters indicate that Respondent Hospitality Motor Inn, Inc., continues as the official corporate name but that the Respondent is doing business as Harley Hotels Inc., and that Harley Hotels, Inc., is a division of Helmsley Hotels.

2 The facts herein are based upon the pleadings and admissions therein.

sing, Michigan facility, goods and materials valued in excess of $1,000 were transported and delivered to its facility in Lansing, Michigan, directly from points located outside the State of Michigan.

As conceded by Respondent and based upon the foregoing, it is concluded and found that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved 3/

Hotel & Restaurant Employees & Bartenders Union, Local # 235, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Preliminary Issues* 4/

1. Supervisory status

At all times material herein, the following named person occupied the position set opposite his name, and has been and is now a supervisor of the Respondent, within the meaning of Section 2(11) of the Act, and its agent.

Edward C. Jenss Manager, Personnel Services

2. Appropriate bargaining unit

All full-time and regular part-time employees employed by the Respondent at its facility located at 3600 Dunckel Road, Lansing, Michigan, including all lodging, food and beverage

3 The facts are based upon the pleadings and admissions therein.

4 The facts are based upon the pleadings and admissions therein.

employees, but excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act, consititutes a unit appropriate for purpose of collective bargaining within the meaning of Section 9(b) of the Act.

3. The certification

On or about March 3, 1978, a majority of employees in the unit described above, by secret ballot election pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director for the Seventh Region of the Board in Case 7-RC-14663, designated and selected Hotel & Restaurant Employees & Bartenders Union, Local # 235 as their exclusive representative for the purpose of collective bargaining with the Respondent, and on or about March 13, 1978, the aforesaid Regional Director certified said Union as the exclusive collective-bargaining representative of the employees described above.

4. The majority status of the Union

The facts are clear that the evidence presented in this proceeding does not establish that the Union was not and is not the exclusive collective-bargaining representative of the employees in the above referred to appropriate collective-bargaining unit. Rather, Respondent counsel stated in effect that its defense was related to the establishment of a "good faith" doubt of the Union's majority status. The same defense may be said to raise an issue of whether the "presumption" of majority status flowing from a certification has been rebutted. The evidence relating to Respondent's "good faith" doubt defense is insufficient to establish a "good faith" doubt and is insufficient to overcome the presumption of majority status of the Union flowing from the certification of the Union as exclusive collective-bargaining representative of the employees in the above referred to appropriate bargaining unit.

Thus, the overall evidence reveals that the bargaining unit has around 120 employees, that at the time of the NLRB representation election held on March 13, 1978, the election ta-

ly of the votes reflected that 56 employees had voted for the Union and that 43 employees had voted against representation by the Union. Respondent's witnesses Weld, Hoffman and Green testified in composite effect that they had discussions concerning the Union with some 33 employees, that such discussions occurred prior to Respondent's April 1979 refusal to bargain with the Union, and that during such discussions such employees expressed dissatisfaction with union representation. The testimonial evidence does not reveal that the employees, alluded to by Respondent's witnesses, had been employees who had previously been for the Union or had voted for union representation. Some of the testimony clearly was to the opposite effect, that such employees had always been opposed to the Union. Under such circumstances and considering the closeness of the March 13, 1978, representation vote, such evidence is insufficient to establish a change in employees' desires for representation by the Union and is insufficient to rebut the presumption of majority status accorded the Union as a result of the March, 1978, certification as exclusive collective-bargaining representative. Further, such evidence is insufficient to reveal objective criteria as a basis for a good-faith doubt of the Union's majority status. 5/

B. *The Unfair Labor Practices*
The Request for Bargaining
The Refusal

The General Counsel alleges and the Respondent denies that

Since on or about April 18, 1979 and continuing to date, Respondent, through its agent Jenss, has failed and refused to bargain in good faith with the Union by the following acts:

a) Sending a letter to the Charging Party stating as follows:

"We are in receipt of your letter of April 9, 1979 requesting a continuation of bargaining. By your own admission in the *Lansing Journal* dated March 14, 1979, the union no longer represents a majority of

---

5 *Terrell Machine Company*, 173 NLRB 1480.

employees. Therefore, the company respectfully declines your invitation to meet again."

b) Failing and refusing since said date to meet and bargain with the Union.

The facts relating to such issues are herein set out.

On April 9, 1979, the Union sent the following letter to the Respondent.

April 9, 1979

Mr. Edward C. Jenss
Manager, Human Resources
Hospitality Motor Inns, Inc.
2100 Terminal Tower
Cleveland, Ohio 44113

Dear Mr. Jenss:

On March 7, 1979 Local 235 sent a certified letter to you requesting a Bargaining Session as soon as possible to continue negotiations.

As of todays date April 9, 1979 Local 235 has not received an answer by mail or by telephone to our request.

I am again requesting a bargaining session as soon as possible to continue the negotiations.

Sincerely yours,

William E. Weld
Financial Secretary-Treasurer
Business Agent
Local 235

CC: Dale Stormer, International Representative

On April 18, 1979, the Respondent replied to the Union's April 9, 1979, letter as is revealed by the following.

April 18, 1979

Mr. William E. Weld
Hotel and Restaurant Employees &
Bartenders Union, Local No. 235
422 N. Walnut Street
Lansing, MI 48933

Dear Mr. Weld

We are in receipt of your letter of April 9, 1979 requesting a continuation of bargaining. By your own admission in the *Lansing Journal* dated March 14, 1979, the union no longer represents a majority of employees. Therefore, the Company respectfully declines your invitation to meet again.

Sincerely,

Edward C. Jenss
Manager, Personnel Services

The facts are clear that the Respondent has since April 18, 1979, continued to refuse to recognize and bargain with the Union. Thus, on October 9, 1979, the Union sent a letter to Helmsley Speer, Inc., attention Alan Cambra, referred to the Union's certified status at Hospitality Motor Inn in Lansing, referred to Helmsley as the successor to Hospitality Motor Inn, referred to pending unfair labor cases, and requested bargaining. On October 19, 1979, Alan K. Cambra for Harley Hotels, Inc., replied apparently to such October 9, 1979, union letter and in effect referred to a hearing held on March 6, 1979, before Administrative Law Judge Winkler, and that a resolution of such charges should be forthcoming. Around November 30, 1979, the Union sent an undated letter to Alan K. Cambra of Harley Hotels, Inc., referred to Hospitality Inn, Lansing, Michigan, referred to a recent decision by Administrative Law Judge Winkler and requested a bargaining session. On December 12, 1979, Respondent's counsel responded to the aforesaid undated union letter, referred to the charge involved in the instant case as being the subject of litigation before the

National Labor Relations Board, referred to the decision of Administrative Law Judge Winkler and set forth that the Respondent was in the process of filing exceptions to such decision, set forth that as to Case 7-CA-16351, Respondent had been advised that a hearing date had been set in January, 1980. Such letter further set forth a refusal to submit information requested and a refusal to resume bargaining.

The facts are clear that the Respondent since on or about April 18, 1979, has refused to bargain with the Union. The only issue is whether the Respondent has a good-faith doubt based upon objective criteria to afford it a defense for such refusal to bargain. As has previously been indicated, the testimony by Respondent's witnesses, as to statements made to supervisors or heard by supervisors as to employee dissatisfaction with the Union, is not sufficient to reveal a good-faith doubt as to the Union's majority status. There remains for consideration the evaluation of alleged statements made by union officials to Respondent officials, apparently before March, 1979, and alleged statements alluded to in a newspaper story.

Thus, a newspaper article, written by Patrick J. Fitzgerald and published on March 14, 1979, alluded to statements by union official Weld as is revealed by the following excerpt therefrom.

* * *

> Union business agent William Weld said only 32 of the 120 workers employed at Hospitality during the election last March, and only one member of 12 on the original bargaining committee, are still employed by Hospitality.
>
> "People have quit under the harassment," said Weld. "The company is trying to break the union before we get the contract."

* * *

It is noted that Respondent's letter of April 18, 1979, alluded to Weld as having admitted as revealed by such newspaper article that the Union no longer represents a majority of employees.

It is clear from a reading of such newspaper article that the newspaper article does not reveal an indicated admission that the Union no longer represented a majority of employees. Rather, the newspaper article as a whole reveals complaints and contentions that the Respondent was engaging in unfair labor practices and trying to break the Union. Considering all of this, such newspaper article does not constitute objective criteria upon which a good-faith doubt of the Union's majority status can be based.

In this regard, I note that the newspaper article alludes to a turnover of employees, that only 32 of the employees in the appropriate bargaining unit of employees at the time of the March 1978 representation election remained employed in March of 1979, and that only one member of the bargaining committee of 12 in 1978 remained employed in March of 1979. Ryan, for the Respondent, testified to the effect that high turnover of employees as occurred in 1978 was not abnormal as is revealed by the following excerpt from his credited testimony.

* * *

Q. This was in early April of '79?

A. Correct. There were only 24 employees that had previously—give or take one or two, it was in the 24 area.

Q. Was this an abnormal turnover rate during this period?

A. Not at all. We experience a great deal of turnover, it's quite high. I think that year it was around 160 or 170 percent.

Q. What accounts for this high turnover rate if you know?

A. Students we employ and mothers and parents that work while their children are in school and then they take the summers off and a lot of students are employed.

* * *

Considering the above, a normal high turnover of employees does not warrant a belief of presumption that a change in attitude toward the Union would result. Thus, such references to a high turnover of employees, and a high turnover of employees as was actual, in the context that such turnover of employees was normal, does not constitute objective criteria supporting a basis for a good-faith doubt of the majority status of the Union. Nor do such facts when coupled with statements of employees as revealed by the testimony in this proceeding, reveal a change in attitude by employees toward the Union. Thus, all such facts do not reveal objective criteria to support a good-faith doubt of the Union's majority status.

There remains for consideration whether the union officials made statements to Respondent's officials at a bargaining session, apparently in March of 1979, that constituted objective criteria to support a good-faith doubt of the Union's majority status.

Respondent's main item of evidence concerning such alleged statements is revealed by the following excerpt from Ryan's testimony.

* * *

Q. Now, were you present at the last negotiating session of the union and company?

A. Yes, I was.

Q. Did you hear either Mr. Weld or Mr. Stormer accuse the company of dissipating their majority in the union at Hospitality?

A. Yes, sir.

Q. Can you recall what Mr. Stormer said first?

A. I honestly—I was trying to put it in my mind of whether it was Mr. Weld or Mr. Stormer, but they had felt that they no longer had a majority and that was part of the reason—he was concerned of the fact that he no longer had a majority. I honestly can't remember the words verbatim but that was an issue at that point.

* * *

The Respondent also elicited testimony from union official Weld as follows:

* * *

Q. At the last negotiation session, you were present, were you not, that was held with Hospitality Motor Inns?

A. You'll have to speak up, I can't hear you.

Q. Were you present at the last negotiating session of Harley or Hospitality Motor Inns?

A. Yes.

Q. And do you recall a discussion about or in which you stated that the company had through unfair labor practices, dissipated your majority status in the hotel, you accused the company of dissipating your majority at the hotel, do you recall that?

A. No. I don't.

Q. You don't recall that. You deny that you said that?

A. I don't recall it.

Q. You wouldn't deny it though, would you?

A. I just don't recall it.

* * *

Q. You wouldn't deny that Mr. Stormer said that we had dissipated the majority over there at the hotel?

A. I just don't remember.

* * *

Considering the foregoing and all the facts, I am not persuaded that the testimony of Ryan is of sufficient probative value to establish that a union official admitted loss of majority status by the Union. Ryan's testimony was obviously weak and conclusionary. Considering the Union's April 9, 1979, request for

bargaining, I am persuaded that Respondent, had the Union admitted such loss of majority status at the last bargaining session, would have alluded to such admission and not to the alleged admission as having been alluded to in the newspaper article. Considering the above and all of the facts, the facts do not reveal objective criteria to support a good-faith doubt of the Union's majority status.

Considering the above, the facts are clear that the Respondent, by its refusal to bargain on April 18, 1979, and thereafter, has violated Section 8(a)(5) and (1) of the Act. 6/

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Having found that the Respondent has refused the Union's request for meeting and bargaining, in violation of Section 8(a)(5) and (1) of the Act, it will be recommended that the Respondent, upon request for bargaining by the Union, bargain collectively

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6 Although General Counsel's complaint allegations narrowly proceeded on the basis that Respondent's sole reason for refusal to bargain was because of the newspaper article, the issue as litigated was broader and touched the general question of whether a good-faith doubt based upon objective criteria existed. The evidence as presented revealed a request for information and a declination of furnishing such information. *Considering the pleadings and statements* made by counsel at *the time of presentation of exhibits into the record*, I am not persuaded that the issue of the refusal to furnish information has been presented as an unfair labor practice issue in litigation in this proceeding.

in good faith with the Union as to terms, wages, and conditions of employment of the employees in the appropriate bargaining unit as found herein, and if agreement is reached, that such agreement be reduced to a signed agreement.

The General Counsel requests that the remedy herein extend the effect of the certification year for 1 year from the date of Order herein. The evidence in this case does not warrant the utilization of such remedy. It may be that the facts as ultimately determined by the Board upon review of Judge Winkler's decision in Cases 7-CA-15392 and 15574 would support such remedy of extension of the certification year. However, by proceeding with this case without consolidation with such cases or prior to Board decision in such cases, the General Counsel's request that I take offical notice of the decision in Cases 7-CA-15392 and 15574 must be rejected. 7/

The General Counsel, in brief, asks for extraordinary remedies and is revealed by the following exerpts from such brief.

* * *

> Respondent's other evidence of its "good faith doubt" consists of reliance on a newspaper article quoting Weld speaking about employee turnover, a factor the Board does not consider to be evidence of loss of majority and alleged statements by some representative of the Union, never specific by Respondent, accusing Respondent of dissipating the union's majority. Respondent's attempt to use the Union's accusation of wrongdoing as a defense to its refusal to bargain, only makes the frivolous nature of its case more apparent.
>
> The nature of Respondent's defenses lead to the logical conclusion that Respondent seeks not to raise

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7 At the time of signing of this Decision, administratively several days before issuance date of said Decision, the undersigned is unaware of the issuance of the decision by the Board in Cases 7-CA-15392 and 15574. It may be because of administrative processing that such decision will issue before the technical date of issuance of this Decision.

legitimate issues, but rather to delay the proper effectuation of the policies of the Act. The complete lack of substance to the Respondent's defense compels the grant of a remedy to discourage future frivolous litigation, to effectuate the policies of the Act, and to serve the public interest. *Koval Press, Inc.*, 241 NLRB No. 189; *Fetzer Broadcasting Company*, 227 NLRB 1377; *John Singer, Inc.*, 197 NLRB 88; Tiidee Products, Inc., 194 NLRB 1234.

Accordingly, Counsel for the General Counsel requests that Respondent be ordered to reimburse the Board and the Union for expenses incurred by the investigation and processing of the instant case including, but not limited to reasonable attorney's fee, salaries, record and printing costs, travel expenses and per diem. Counsel for the General Counsel further requests that Respondent be ordered to grant the Union access to its bulletin boards during negotiations and that it be ordered to furnish a list of employee names and addresses to be kept current for one year.

* * *

Upon consideration of the record herein, I am not persuaded that such extraordinary remedy is warranted. I am persuaded that the record does not establish objective criteria upon which a good-faith doubt of the union majority status could be based. The determination of this point, however, required an evaluation in the area of credibility of the testimony of Ryan as to what was said by a union official and whether it constituted an admission of loss of majority status by the Union. Considering Ryan's and Weld's testimony, the issues thereto were clearly not frivolous issues. Accordingly, I deny General Counsel's request for extraordinary remedies.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Hospitality Motor Inn, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel & Restaurant Employees & Bartenders Union, Local # 235, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act, and is the certified exclusive collective-bargaining representative of the employees in the below set forth appropriate bargaining unit.

3. All full-time and regular part-time employees employed by the Respondent at its facility located at 3600 Dunckel Road, Lansing, Michigan, including all lodging, food and beverage employees, but excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act constitutes a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. By refusing to bargain with the above referred to Union over terms, wages, and conditions of employment of the employees in the above described appropriate bargaining unit, the Respondent has engaged in conduct violative of Section 8(a)(5) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 8/

ORDER

Respondent Hospitality Motor Inn, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize, meet with, and bargain collectively in good faith with the Union, Hotel & Restaurant Employees & Bartenders Union, Local #235, as the exclusive collective-

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8 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

bargaining representative, upon request for bargaining by such Union, as to terms, wages, and conditions of employment of the employees in the appropriate bargaining unit set out below.

The appropriate bargaining unit is:

> All full-time and regular part-time employees employed by the Respondent at its facility located at 3600 Dunckel Road, Lansing, Michigan, including all lodging, food and beverage employees, but excluding all office clerical employees, managerial employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act except to the extent that such rights may be affected by lawful agreements in accord with Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request by the Union, Hotel & Restaurant Employees & Bartenders Union, Local #235, recognize, meet with, and bargain collectively in good faith with said Union as the exclusive collective-bargaining representative of the employees in the above-described appropriate bargaining unit as to terms, wages, and conditions of employment of the employees in said appropriate bargaining unit, and if agreement is reached, upon request, reduce such agreement to a written signed agreement.

(b) Post at Respondent's facility at Lansing, Michigan, copies of the attached notice marked "Appendix." 9/ Copies of said

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9 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. April 18,1980

/s/ _____
Jerry B. Stone
Administrative Law Judge

APPENDIX C
JUDGMENT ON THE PETITION FOR REHEARING

Order Filed May 14, 1982
In Nos. 80-1583 and 81-1195
In the United States Court of Appeals
For the Sixth Circuit

BEFORE: JONES, Circuit Judge, WEICK, Senior Circuit Judge, and SILER, District Judge*

Upon consideration, no Judge having favored rehearing en banc, the Court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of the appeal. Accordingly, the petition for rehearing is DENIED. Judge Weick adheres to his dissent.

ENTERED BY ORDER OF
THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

The statute involved is the National Labor Relations Act as amended (61 Stat. 136, 73 Stat, 519, 29 U.S.C., Secs. 151, et seq.); the relevant provisions of which are as follows:

Sec. 158. Unfair labor practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees. . .

(5) to refuse to bargain collectively with the representatives of his employees. . .

Sec. 8(d) For the purposes of this section, to bargain collectively is the performancce of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:. . .

Sec. 10(e) The Board shall have power to petition any court of appeals in the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any cuicuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record of the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the

question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification of setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

29 U.S.C. Sec. 159(a), 160(e)

Office-Supreme Court, U.S.
FILED
OCT 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-254

In the Supreme Court of the United States

OCTOBER TERM, 1982

HOSPITALITY MOTOR INN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

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HOSPITALITY MOTOR INN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that petitioner violated Section 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(a)(1), during negotiations for a bargaining agreement, by refusing to bargain in good faith with the newly-certified Hotel and Restaurant Employees & Bartenders Union, Local No. 235 ("the Union") (Pet. App. 14-34).[1] Although petitioner and the Union held 10 bargaining sessions between May 1978 and January 1979, no agreement resulted. The Board found that the totality of petitioner's bargaining conduct, including, *inter alia*, its refusal to consider a union security provision, a union dues

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[1]The Board also found that petitioner violated Section 8(a)(1) of the Act by promoting an employee in order to curtail her union activities. The petition raises no question concerning this finding (Pet. 6 n.3).

checkoff provision, a no-discrimination clause, and a prohibition on individual contracts, as well as its insistence on a very broad management rights clause, "establishes that [petitioner] engaged in bargaining without a good faith intent and effort to 'resolve differences and reach a common ground' with the Union" (*id.* at 27). The Board ordered petitioner, *inter alia*, to "[b]argain in good faith with [the Union]" (*id.* at 32).

2. The court of appeals (Judge Weick dissenting) upheld the Board's decision and enforced its order (Pet. App. 11-13). The court concluded that the Board's finding that petitioner failed to bargain in good faith was supported by substantial evidence (*id.* at 12). Judge Weick disagreed with the majority's conclusion that the Board's findings were supported by substantial evidence (*id.* at 13).

3. Petitioner does not challenge the court of appeals' conclusion that substantial evidence supports the Board's overall finding that petitioner failed to bargain in good faith with the Union (Pet. 6). Rather, petitioner raises only the question whether "substantial evidence supports the particular findings that the company's failure to grant a no-discrimination clause as well as the company's refusal to agree to a unilateral union security clause and a dues check-off clause should be included as forming a part of the company's illegal refusal to bargain conduct" (*ibid.*). That issue does not warrant review by this Court.

Petitioner does not (and could not) contend that nondiscrimination, union security, and dues checkoff are not appropriate subjects for bargaining. See, *e.g.*, *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 69 (1975); *Atlas Metal Parts Co.* v. *NLRB*, 660 F. 2d 304, 308 (7th Cir. 1981). Nor does petitioner suggest that the Board may not consider a party's bargaining positions in the course of determining whether

there has been a violation of the obligation to bargain in good faith.[2] It is well established that, while a party to bargaining negotiations is not required to make concessions or to yield fairly maintained positions, the Board may consider the substance of the party's positions in determining whether it has met its obligation to bargain in good faith. See, *e.g.*, *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 100-101 (1970); *id.* at 110 (Harlan, J., concurring); *NLRB* v. *Holmes Tuttle Broadway Ford, Inc.*, 465 F. 2d 717, 719 (9th Cir. 1972); *Kayser-Roth Hosiery Co.* v. *NLRB*, 430 F. 2d 701, 702-703 (6th Cir. 1970); *NLRB* v. *Reed & Prince Manufacturing Co.*, 205 F. 2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953). This Court has recognized that "the Board has been afforded flexibility to determine * * * whether a party's conduct at the bargaining table evidences a real desire to come into agreement." *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 498 (1960). Such a determination requires the Board to draw inferences from relationships between the parties, antecedent events, and the "course of negotiations." *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 155 (1956) (Frankfurter, J., concurring in part and dissenting in part). The finding that a party has failed to bargain in good faith normally is a matter for the judgment of the Board. *Ibid.*

In this case the Board concluded that the totality of circumstances, including petitioner's intransigent positions on a variety of issues, indicated an absence of good faith bargaining on petitioner's part.[3] Petitioner's contention

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[2]Indeed, petitioner does not contest the Board's bad faith finding with respect to the individual contracts proposal and the management rights proposal (Pet. 6 n.3).

[3]As the court of appeals noted (Pet. App. 11-12), petitioner stated its opposition to the Union repeatedly during the negotiations. See Pet. App. 19-24.

that it was justified in refusing to agree to no-discrimination, union security, and dues checkoff provisions merely reflects disagreement with the Board's judgment (Pet. App. 14 n.1, 24-27) that petitioner's positions were not proffered in good faith, but rather with an intent to frustrate agreement. The court of appeals correctly found that substantial evidence in the record supports the Board's conclusions. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Petitioner contends (Pet. 7-8) that the effect of the Board's order is to require petitioner to include certain clauses in any agreement it may reach with the Union. This contention reflects a misapprehension of the Board's order.[4] The order could not, and does not, require petitioner to agree to any particular proposals. See *H. K. Porter Co.* v. *NLRB*, *supra*. Instead, it simply requires petitioner to bargain in good faith by, *e.g.*, entering into discussions

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[4]The Board's opinion indicates that it was not the refusal to agree to no-discrimination, union security, or dues checkoff clauses in itself that led to the Board's finding of a failure to bargain in good faith, but rather the totality of petitioner's conduct during the course of the negotiations. Indeed, the Board's opinion states specifically that the Act does not require an employer to agree to union security and checkoff provisions (Pet. App. 26). Moreover, the Board's concern was not simply with the content of petitioner's positions, but also with the reasons offered in support of those positions (*id.* at 26-27). For example, petitioner justified its position on union security and dues checkoff on the basis of "philosophical" reasons and a concern that local students would be discouraged by such provisions. The Board concluded that the former justification did not satisfy the statutory obligation to bargain in good faith, and that petitioner had presented no evidence to support the latter reason (*id.* at 26, 20 n.1). Petitioner argued that a no-discrimination clause was unnecessary because the law already prohibits such conduct—a reason the Board found insufficient to preclude consideration of such a contractual obligation enforceable through grievance processes, especially in light of the fact that no-discrimination clauses are commonly included in bargaining agreements (*id.* at 26-27).

with an open mind and abandoning any bargaining positions that are held for the purpose of frustrating agreement. To the extent that petitioner has legitimate reasons to support its bargaining positions, the order in no way precludes it from asserting those reasons. There is no need for this Court to assure petitioner about the proper interpretation of the Board's order.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

OCTOBER 1982

DOJ-1982-10